REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 40906/16

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.
5/12/2019 .....
DATE SIGNATURE

In the matter between:

IMPAC PROP CC Applicant (Respondent in rescission)

And

THF CONSTRUCTION CC Respondent (Applicant in rescission)

JUDGMENT

KEIGHTLEY, J:

INTRODUCTION

1. On 7 December 2016, and on the application of Impac CC (Impac), this court ordered that THF Construction CC (THF) be placed under a winding-up order. The application before me is for the rescission of that order. The application is brought by THF, and is opposed by Impac, whose sole member is Ms Lam. The deponent to the founding affidavit in the rescission application is Ms Leong, the sole member of THF. She contends that she brings the application in her representative capacity,

as the sole member. Ms Leong's estate was placed under provisional sequestration on 23 September 2014. The sequestration application was instituted by Wing Dai Trading, a firm under the sole proprietorship of Ms Lam. In a separate judgment handed down simultaneously with this one, I have granted an order confirming, and making final, the provisional order of sequestration in respect of Ms Leong's estate.

2. Ms Leong's provisional sequestration has implications for the rescission application in that while her estate is under sequestration it is the trustee of the estate who steps into the shoes of Ms Leong in respect of her member's interest in THF. The trustee has not consented to Ms Leong instituting the rescission application on behalf of THF, nor has the trustee been cited in these proceedings. Similarly, the liquidator of THF has not been cited, nor been given notice of the rescission application. As I discuss in more detail shortly, these facts raise issues as to the propriety of the application.

3. A further complicating factor is that THF relies on the common law as the basis for the rescission application. Impac submits that this is impermissible, and that the application should properly be made under s354 of the Companies Act 61 of 1973. That section provides that:

> "The Court may at any time after the commencement of a winding up, on the application of any liquidator, creditor or member and, on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding up on such terms and conditions as the Court may deem fit." (My underlining)

4. It is apparent from the underlined portion of the section that in an application under s354, it is only the liquidator of the entity under winding up, or a creditor or member, who have *locus standi* to commence proceedings. The entity itself has no such *locus standi*. In this application, THF is cited as the applicant, and Ms Leong, whose

own estate is under sequestration, brings the application in a representative capacity as the member.

5. From this brief introduction, a number of preliminary points are raised: does s354 apply to the application for rescission, or is it permissible to rely on the common law; if s354 applies, does Ms Leong have *locus standi* in view of the fact that her estate is sequestrated and her trustee is not involved in the application; should the trustee and the liquidator of THF have been joined in these proceedings? It is only once these preliminary questions are determined in favour of the applicant that it will be necessary to proceed to consider the substance of the rescission application.

BASIS FOR THE APPLICATION: COMMON LAW OR SECTION 354?

6. THF's submission that it is permissible to bring the rescission application on the basis of the common law and not s354 of the Companies Act is premised on the decision of this court in *Storti v Nugent & Others.*[1] In that case, Gautschi AJ considered the question of whether s354 applied to both the situation where the setting aside of the winding-up order is sought on the basis that it should not have been granted, and to the situation where supervening events render it necessary or desirable to stay or set aside the proceedings. He concluded that it was only applicable to the latter situation and not the former. As such, the court found that where an applicant sought rescission on the basis that the winding-up order ought not to have been granted, the applicant could not rely on s354 of the Companies Act, and, instead, would have to rely on either s149(2) of the Insolvency Act, or the common law.[2]

[1] 2001 (3) SA 783 (WLD)
[2] At 805H & 806J-807B

7. THF submits on the basis of this judgment that it is entitled to rely on the common law as the basis for rescission, and thus that all it must establish is that it has a reasonable explanation for its default in not opposing the application for winding up, and that it has a bona fide defence to the winding-up application.

8. Although the *Storti* judgment *prima facie* provides authority for THF's position, it is not good authority. This is because the court in *Storti* overlooked the existing judgment of the Supreme Court of Appeal on the issue in *Ward v Smit & Others: In re Gurr v Zambia Corporation Ltd*,[3] in which the higher court came to the opposite conclusion. In that case the SCA held as follows:

> "In order to have the final winding-up order set aside the appellants were obliged to invoke the provisions of s354(1) of the Act. ... The language of the section is wide enough to afford the Court a discretion to set aside a winding-up order both on the basis that it ought not to have been granted at all and on the basis that it falls to be set aside by reason of subsequent events. (Meskin *Henochsberg on the Companies Act* at 747; see also Joubert (ed) *The Law of South Africa* vol 4 first re-issue para 185 (M S Blackman). In the case of the former, the *onus* on an applicant is such that generally speaking the order will be set aside only in exceptional circumstances. This has been emphasised by the Courts of various Provincial and Local Divisions not only in relation to s354 and its predecessor (s 120 of Act 46 of 1926) but also in relation to s 149(2) of the Insolvency Act of 1936 which affords a similar discretion to a Court to rescind or vary a sequestration order. (See *Herbst v Hessels NO en Andere* 1978(2) SA 105 (T); *Aubrey M Cramer Ltd v Wells NO* 1965 (4) SA 304 (W); *Abdurahman v Estate Abdourahman* 1959(1) SA 872 (C)). There is nothing in the section to suggest that the Court's discretionary power to set aside a winding-up order is confined to the common law grounds for rescission. However, in the *Herbst* case, supra, Eloff J expressed the view (at 109 F-G) that no less would be expected of an applicant under the section than of an applicant who seeks to have a judgment set aside at common law. I think it must be correct. The object of the section is not to provide for a rehearing of the winding-up proceedings or for the Court to sit in appeal upon the merits of the judgment in respect of those proceedings. To construe the section otherwise would be to render virtually redundant the facilities available to interested parties to oppose winding-up proceedings and to appeal against the granting of a final order. It would also 'make a mockery of the principle of *ut sit finis litium*'. (*Abdourahman v Estate Abdurahman* (supra at 875G-H). It follows that an applicant under the section must not only show that there are special or exceptional circumstances which justify the setting aside of the winding-up order; he or she is ordinarily required to furnish in addition a satisfactory explanation for not having opposed the granting of the final order or appealed

[3] 1998 (3) SCA 175

against the order. Other relevant considerations would include the delay in bringing the application and the extent to which the winding up had progressed."[4]

9. More recently, this court endorsed the binding authority of the SCA decision in *Ward* and held, citing *Ward*, that:

> "... it is correct to say that s354 is the legislated basis to rescind winding-up orders, and that this would include orders that were allegedly erroneously sought or granted."[5]

10. It is clear from these authorities that insofar as the issue of the ambit of s354 is concerned, the decision in *Storti* is clearly wrong. Thus, I am not bound to follow *Storti* in this particular respect. On the contrary, the authorities are clear that the application for rescission ought to have been based on s354 of the Companies Act and not the common law. I should add, for sake of completeness, that Gautschi AJ in *Storti* nonetheless found that although s354 of the Companies Act did not apply, the effect of s339 of the Act, was that s149(2) of the Insolvency Act was applicable, and he went on to consider the application on the basis of that section. Section 149(2) gives a court a similar power to that established under s354. Consequently, the judgment in *Storti* remains relevant and applicable, albeit it not for purposes of upholding THF's submission that its remedy lies under the common law.

LOCUS STANDI AND JOINDER

11. As I have already indicated, under s354 only certain parties have *locus standi* to bring an application to set aside a winding-up order: the liquidator, a creditor and a member of the entity concerned. Ms Leong brings the application in her representative capacity as the sole member of THF. She has a difficulty in this regard in that her estate was under provisional sequestration at the time that she

---

[4] At 180F-181E

[5] *Ragavan & Another v Kal Tire Mining Services SA (Pty) Ltd & Others* [2019] ZAGPPHC 455 (12 August 2019)

launched the application on THF's behalf, with the effect that her member's interest in THF vested in her trustee, who did not consent to her instituting the proceedings.

12. Ms Leong recognises that ordinarily the consent of the trustee would be required to seek to set aside the winding-up order in respect of THF. She stated in her founding affidavit that she sought such consent on the basis that the effect of the winding-up order was to place a sizeable asset in her estate under liquidation, which would have dire effects on her as a business woman. However, she contends that the trustee refused his consent to her launching this application. In the circumstances, she relies on her common law reversionary right as an insolvent to launch proceedings on behalf of her estate in matters pertaining to the administration of the estate. On this basis, she asserts that she has *locus standi* to institute proceedings as a member of THF, notwithstanding that her estate is under sequestration.

13. Our common law recognises that although an insolvent is by and large divested of her estate, she retains a reversionary interest in it. Accordingly, she may litigate to ensure that the estate is properly administered. Thus, she may institute action to recover or protect property that vests in the trustee should the trustee refuse to take the necessary action.[6] However, this principle is not without limitation. An insolvent does not have a general right to prescribe how the estate should be administered. She may bring proceedings to interfere with the administration of the estate only if she would otherwise suffer an injustice due to an irregularity or a lack of *bona fides* on the part of the trustee.[7] An insolvent does not have *locus standi* to litigate in the absence of such irregularity or maladministration.[8]

---

[6] Sharrock *et al* Hockley's Insolvency Law (9ed) at 4.3.1
[7] Sharrock *et al, ibid*
[8] *Muller v De Wet & Others* 1992 (2) SA 1024 (W)

14. It was submitted on behalf of Impac that Ms Leong's reversionary right in her estate does not find application for purposes of establishing *locus standi* in a case like this one. This is because, so it was submitted, the effect of the winding up of THF is not to divest Ms Leong's estate of an asset in the form of her member's interest in THF: her member's interest remains intact as part of her estate, regardless of THF's liquidation. All that may be affected by the winding up of THF is the value of Ms Leong's member's interest. Impac submitted that the common law reversionary right did not extend so far as to permit Ms Leong to institute proceedings to set aside THF's winding up in these circumstances.

15. It seems to me that there may be some merit in Impac's submissions in this regard. Ms Leong's action in seeking to set aside the winding-up order in respect of THF is only indirectly linked to the administration of her own sequestrated estate. It is not at all clear that the common law reversionary right would extend so far as to grant her *locus standi* in this situation. However, it is not necessary for me to make a finding in this regard. Even assuming that the common law does extend so far, there are other reasons why Ms Leong's claim to *locus standi* faces difficulty.

16. In the first place, I am not satisfied that she has established that her trustee refused his consent to permit her to institute the application on behalf of THF. Attached to the founding papers in the rescission application is a series of correspondence exchanged between Ms Leong and THF's attorney and the trustee of her estate. The letters detail the request by Ms Leong to be permitted to proceed with the rescission application, and the trustee's response to that request. The attitude of the trustee is clearly set out: he placed on record that Ms Leong had a history of failing to comply with her statutory obligations to co-operate with the trustee, including her leaving South Africa and failing to attend the inquiry ordered by the Master; he recorded that he could not simply comply with her request to litigate and

that to enable him to respond to the request he required her co-operation in providing him with certain information. One of the matters the trustee indicated Ms Leong had not divulged was her defence to the winding-up application. The trustee invited Ms Leong and her attorney to meet with him and his co-trustee with a view to obtaining the necessary information required in order to give further consideration to Ms Leong's request.

17. It is common cause that the meeting did not take place, and Ms Leong instead elected to institute these proceedings. It seems to me that in so doing Ms Leong took matters into her own hands. The trustee had not refused his consent to her litigating. On the contrary, his correspondence makes it clear that he could not properly respond to her request without Ms Leong's co-operation in, among other things, providing him with necessary information. She refused to do so, and consequently, the matter remained unresolved.

18. Even if, for argument's sake, the trustee's response could be interpreted as a refusal to consent to Ms Leong's request, she must overcome yet another hurdle. There seems to me to have been nothing untoward in the trustee's attitude to Ms Leong's request. He was not bound to accede to it, and, indeed, he would have been failing in his duties as a trustee had he blindly agreed to her request given her failure to co-operate with him and her failure to provide him with the information he requested. There was thus no maladministration, irregularity or absence of *bona fides* on the part of the trustee in adopting the attitude that he did. For this reason, Ms Leong could not properly claim, on the basis of the common law reversionary right, to have the necessary *locus standi* to institute the present application in the absence of the trustee's consent.

19. For all of these reasons, I agree with the contentions made by Impac as to Ms Leong's absence of *locus standi*. For this reason alone, the application falls to be dismissed.

20. There is an additional reason to dismiss the application on preliminary grounds. The only party joined as a respondent in the rescission application was Impac. Neither the liquidator of THF, nor Ms Leong's trustee where joined, nor were the Master or any creditors of THF. These parties ought to have been joined. I do not agree with THF's submission that the trustee and liquidator had only an indirect interest in the application: *ex officio*, the liquidator had a direct and substantial legal interest in the application, as did the trustee, in whom Ms Leong's member's interest vested. The failure to join these parties in my view constituted a fatal defect in the application.

21. In light of my findings on these preliminary issues, it is unnecessary for me to proceed further to consider the substance of the application to set aside the winding-up order. In the event that I may be wrong in my findings in this regard, I consider briefly whether a proper case has been made out on the merits of the application.

IS THERE A CASE ON THE MERITS?

22. As the *dictum* cited above in *Ward* makes clear, an application under s354 is not aimed at a rehearing of the winding-up proceedings, nor is it an appeal against the winding-up order. The applicant must show that there are exceptional circumstances warranting the order being set aside. The burden on the applicant is thus heavier than that on an applicant in an application for rescission under the common law, in that it must show more than simply a *bona fide* defence. It has also

been held, with reference to s149(2) of the Insolvency Act, which finds similar application, that an applicant should show *prima facie* that the company is solvent.[9]

23. In the present matter, Ms Leong contends that the debt relied on by Impac for purposes of seeking THF's liquidation did not exist. She accepts that Impac mandated THF to collect rentals from the lessee's of properties that she had sold to Impac. She does not dispute that THF caused the rentals to be collected (via a third party entity), and that the rentals were paid into THF's bank account. Nor does she dispute that THF never accounted to Impac in respect of the monies collected or paid them over to Impac. It is common cause that THF utilised the monies collected for its own, and/or Ms Leong's purposes. Ms Leong contends that THF was never legally bound to pay over any monies to Impac because Ms Leong held a right of cession over the rentals.

24. Impac disputes the legal validity of this defence on a number of different grounds. It is not necessary to discuss the merits of the defence in any further detail. Even if it is accepted for argument's sake that it might constitute a *prima facie* defence to the debt claimed by Impac against THF (and I make no finding to this effect), this in itself is not enough to justify the setting aside of the winding-up order. As I have already indicated, in addition, it is incumbent on the applicant to establish the existence of special and exceptional circumstances. The applicant must also show that THF is solvent.

25. As to the latter issue, THF asserts that it is solvent. It initially relied on annual financial statements in support of its assertion. However, in reply, and after the statements were criticised by Impac, THF conceded that the statements it had relied on did not bear scrutiny. It annexed further annual financial statements to its

[9] *Storti*, above at 809B-C

replying affidavit in an effort to show that it was solvent. Impac filed a supplementary affidavit to which was attached a report by its accounting expert, Mr Greyling. Mr Greyling pointed out that THF relied on the inclusion of a deferred tax asset in the latest financial statements to bring the entity into the realms of solvency. Without this deferred tax asset, the entity would not be solvent. In summary, Mr Greyling's opinion was that:

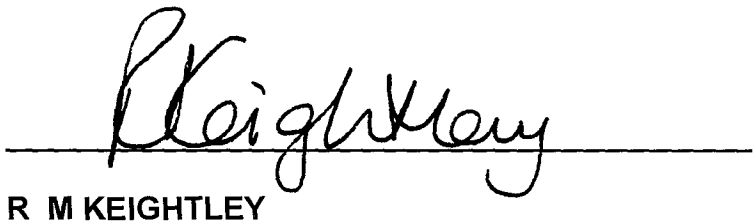
> "... the evidence is not provided to justify raising a deferred tax asset of in excess of R3 million in THF, based on the available evidence. There is no evidence to justify that the tax loss can be utilised and a deferred tax asset reflected in accordance with IAS 12. ... the new AFS of THF are also misstated as a result of the unjustified reflection of a deferred tax asset of in excess of R3 million... to reflect a deferred tax asset of R3,407 million at February 2016 to restore the solvency of THF is not in compliance with IFRS or IAS as there is no evidence that sufficient taxable income will be available in the foreseeable future to justify the carrying value of the deferred tax asset of R3,407 million. Consequently, restated, the new AFS of THF remain misstated as the deferred tax asset should be reversed in which event the liabilities materially exceed the assets of THF which would be factually insolvent and commercially insolvent to the extent that the members loans are not available in future to fund any operating losses....
>
> .. THF is commercially and factually insolvent in that it does not meet either the solvency or liquidity requirements of Section 4 of the Companies Act, notwithstanding that this is a close corporation. As concluded above, ... accounting for a deferred tax asset without substantial corroborating evidence of probable, foreseeable taxable income, required that a deferred tax asset should not be raised where it is not probable that future taxable income will occur. As there is no evidence thereof, no deferred tax asset should be recorded for THF which results in the liabilities materially exceeding the assets of THF at February 2016 by some R3,5 million and but for the subordination of the members loan, THF is unable to pay its liabilities when they become due in the ordinary course of business..."

26. THF did not seek to file any response to Mr Greyling's expert assessment of the latest financial statements it relied on in an effort to show that it was solvent. All reasonable indications are that the entity is not solvent. In the absence of cogent evidence as to THF's solvency, it is difficult to conclude that there are special and exceptional circumstances warranting the exercise of the court's discretion in favour of setting aside the winding-up order.

27. For these reasons, even if my findings on the preliminary issues are discounted, I would dismiss the application on the merits in any event.

28. In the circumstances, I make the following order:

1. The application is dismissed with costs, such costs to include those of senior and junior counsel.



R M KEIGHTLEY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard	: 07& 8 October 2019
Date of Judgment	: December 2019
Counsels for the Applicant	: JW Steyn
Instructed by	: B Xulu & Partners Incorporated
Counsel for the Respondent	: G Farber (SC)
	JL Kaplan
Instructed by	: Ian Levitt Attorneys